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ABSTRACT

In two recent cases, the U.S. Supreme Court addressed the authority of public secondary schools to exercise control over student publication in the school newspaper (Hazelwood v. Kuhlmeier, 1988) and student meetings on school premises (Board of Education v. Mergens, 1990). The Court ruled for substantial school authority with respect to the content of the school newspaper but upheld students' right of equal access with respect to student meetings. It is argued that the two decisions are based on inconsistent assumptions about the intellectual competence of adolescents. A more consistent approach would be based on either a rebuttable presumption of adolescent immaturity or a rebuttable presumption of adolescent maturity. Current psychological evidence is more consistent with the latter presumption. Implications for other legal, educational, and social policy decisions concerning adolescents are discussed. Thirty-five references are included. (Author/RH)

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# Adolescent Reasoning and Adolescent Rights

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Abstract

In two recent cases, the U.S. Supreme Court addressed the authority of public secondary schools to exercise control over student publication in the school newspaper (Hazelwood v. Kuhlmeier, 1988) and student meetings on school premises (Board of Education v. Mergens, 1990). The Court ruled for substantial school authority with respect to the content of the school newspaper but upheld students' right of equal access with respect to student meetings. It is argued that the two decisions are based on inconsistent assumptions about the intellectual competence of adolescents. A more consistent approach would be based on either (a) a rebuttable presumption of adolescent immaturity or (b) a rebuttable presumption of adolescent maturity. Current psychological evidence is more consistent with the latter presumption. Implications for other legal, educational, and social policy decisions concerning adolescents are discussed.

# Adolescent Reasoning and Adolescent Rights

No one knows what to make of adolescents; it has long been apparent that the U.S. Supreme Court is no exception. Two recent cases highlight the problem.

In Hazelwood v. Kuhlmeier (1988), the Court addressed a case in which a high school principal had censored two serious articles concerning divorce and adolescent pregnancy that were scheduled to appear in the school newspaper. Ever since Tinker v. Des Moines (1969) clarified the applicability of the First Amendment to public schools, courts had generally been upholding student freedom of the press in cases of this sort (Ingelhart, 1986). The U.S. Court of Appeals for the Eighth Circuit was no exception, holding that the articles in question, which were not obscene, disruptive, libelous, or otherwise violative of anyone's rights, were protected by the First Amendment (Kuhlmeier v. Hazelwood, 1986).

The Supreme Court reversed, ruling 5-3 that a public high school may, for any of a wide variety of reasons, censor articles written by students for the school newspaper. A school may, for example, forbid publication if it deems an article "unsuitable for immature audiences" (p. 271) or fears the article will "associate the school with any position other than neutrality on matters of political controversy" (p. 272).

In Board of Education v. Mergens (1990), a group of Christian students had requested permission to form a Bible study club that

would meet on the same voluntary basis as other extracurricular student groups. The school refused, citing concerns about the separation of church and state. The students countered that the exclusion of their group from the extracurricular forum constituted content-based censorship of expression. They argued that this violated both (a) First Amendment precedents concerning access to public forums and (b) the Equal Access Act (1984), a federal law applying First Amendment public forum doctrine to voluntary student groups in public secondary schools.

Siding with the students this time, the Supreme Court ruled 8-1 that a public high school that permits noncurriculum-related student groups to meet on its premises must permit all such groups, including religiously-oriented groups, on an equal basis. Dismissing fears that this will lead students to perceive the school as endorsing religious views, the plurality maintained that

> secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis . . . . The proposition that schools do not endorse everything they fail to censor is not complicated (p. 2372).

There appears to be a serious inconsistency here. Both opinions directly raise the issue of whether a public high school, having provided a forum for student expression, may censor some student speech out of concern that other students will be unable to distinguish voluntary student expression from the official views of the school. In Hazelwood, the Court decided this concern was

sufficiently compelling to override clear First Amendment precedents; in Mergens, the Court dismissed the concern on the basis of adolescent maturity.

In the next section, I consider the two decisions in more detail and conclude that the inconsistency in assumptions about adolescents is real and important. I then argue that such inconsistency, far from being a special problem of the Court, is in fact very general to the way both liberals and conservatives conceptualize the issues in question. Next, I propose two consistent approaches to these issues, one involving a rebuttable presumption of adolescent immaturity and the other a rebuttable presumption of adolescent maturity. I argue that the latter presumption is better justified on the basis of existing psychological research. Finally, I extend the analysis to other issues involving adolescents and consider some implications for law, education, and social policy.

## Students, Curriculum, and School Authority

No two cases are exactly alike. It can always be argued that an apparent inconsistency in results is justified by a difference between the cases.

In both Hazelwood and Mergens, public high school administrators suppressed voluntary student speech on grounds that seemed to assume students' cognitive immaturity. I have suggested that the Supreme Court was inconsistent in uncritically accepting such an assumption in Hazelwood and rejecting it in Mergens. It might be argued, however, that the Court was properly distinguishing the cases with respect to the relation of the students' speech to the school's curriculum.1

A key distinction made by the Court in Hazelwood was the distinction between "expressive activities that . . . may fairly be characterized as part of the school curriculum" and "a student's personal expression that happens to occur on the school premises (p. 271)." The school newspaper was deemed part of the curriculum and this was central to the Court's determination in favor of school authority over what is published in that newspaper. In Mergens, by contrast, the Court concluded that the school had already permitted student groups not directly related to the curriculum and therefore could not discriminate against other such groups. It might be argued, then, that Hazelwood is distinct from Mergens in that the former addresses student speech within the curriculum and the latter addresses student speech outside the curriculum.

Devising a curriculum is a subtle and complex task that

unavoidably involves a variety of content-based decisions about what ideas to communicate, what books to use, and so forth. A strict First Amendment ban on content-based distinctions by government would render public education, as well as many other important government activities, quite impossible. Obviously, then, there is good reason for restraint in applying the First Amendment to governmental decisions about curriculum (Moshman, 1989, pp. 41-47; 119-132; Yudof, 1987, 1988; Board of Education v. Pico, 1982, Rehnquist, J., dissenting).

Education not only requires a curriculum but teachers to implement that curriculum. Government may therefore require that teachers teach what they are hired to teach. A public school system may decide that students need to learn algebra, including certain content; may hire teachers to implement the algebra curriculum; and may require that such teachers teach algebra, including certain specified ideas and topics, rather than history, chemistry, or their own idiosyncratic theory of algebra. Enlightened administrators and school boards will, of course, recognize that education is best served by permitting teachers a substantial degree of academic freedom. Nevertheless, when public school teachers are teaching they are acting as agents of the government. Their expressive activity in the classroom is a job they have been hired to do and their First Amendment freedom of expression is thereby correspondingly restricted (Kirkland v. Northside, 1989; Yudof, 1987, 1988).

But students, in sharp contrast to teachers, are in no sense agents of the government. It is not their job to communicate the

content of the government's curriculum. How then can governmental restrictions on their expression be justified?

At the college level, substantial restrictions on student expression, even within the curricular context, are indeed difficult to justify. Within a classroom, of course, time is limited. A teacher must have the authority to end discussion in order to move to a new topic or to cut off a long speech by a student in order to allow the class to hear from other students. But if a teacher only calls on students who agree with his or her perspective and refuses class time to those who disagree, the students who are denied equal opportunity to express their views have a serious constitutional complaint.

Restrictions by administrators on the content of the typical campus newspaper would be even more difficult to justify. A college may, of course, publish a newspaper designed to communicate its official views and may determine what appears in that newspaper (Yudof, 1988). But the typical campus newspaper serves as a forum for expression by students on a wide range of topics. A public college or university need not set up or finance this sort of newspaper but, if it chooses to do so, its control over it is strictly limited by the First Amendment (Sinn v. The Daily Nebraskan, 1987).

In the case of young children, on the other hand, it might be argued that, for them to learn what the school is trying to teach, the school must actively ensure that they hear a consistent set of messages. The school may thus justify censoring ideas inconsistent with those it is trying to inculcate on the ground that young children will be unable to identify and learn what the school is trying to

teach if those teachings must be abstracted from a complex marketplace of ideas. Young children may be unable to distinguish the views of the school from the views of other students. Therefore, in order to assure an educational atmosphere with a consistent message, a school may exert authority over all speech connected with the curriculum, including articles in curriculum-related school newspapers, regardless of whether the speech is that of the teacher or that of the students. Presumably, this is what the Hazelwood Court had in mind in its determination that "a school need not tolerate student speech that is inconsistent with its 'basic educational mission' (p. 266)."

If high school students are so immature that a school's "basic educational mission" will be compromised by permitting students to express alternative views, the Hazelwood decision is perhaps defensible. If, however, high school students are sufficiently mature to distinguish official expression by the school from views expressed by their classmates, the rationale for censoring student expression within the curriculum evaporates. In that case, the First Amendment would seem to require, as explained in Tinker v. Des Moines (1969, p. 511), that

> students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

It appears, then, that although a distinction between curricular and noncurricular contexts is important for many purposes, it cannot justify the school newspaper censorship permitted in Hazelwood

without further assumptions about the immaturity of the students involved. Special limitations on student expression in curricular contexts can only be justified by a showing that such limitations are necessary for education to proceed; that is rarely the case for mature individuals.

## Liberal and Conservative Inconsistencies

Inconsistency in assumptions about the maturity of adolescents is by no means unique to the Supreme Court. I will argue in this section that both liberals and conservatives are inconsistent in their approach to the First Amendment issues raised by high school newspapers and student religious groups. I use the terms "liberal" and "conservative" not in any technical sense but in the way these terms are ordinarily understood in late 20th century America. Thus, what I identify below as the "liberal" view is the official position of groups such as the American Civil Liberties Union and People for the American Way. By "conservative" I refer to the perspective of the Reagan and Bush administrations and their supporters.

Liberals see cases such as Hazelwood as being fundamentally about freedom of expression. They interpret the First Amendment as guaranteeing broad and firm rights to free expression. Against the argument that censorship is less of an issue in the case of adolescent students, liberals are quick to call up an image of mature individuals engaged in thoughtful intellectual exchange and thus to discount any notion that adolescents have limited rights or need special protections.

By contrast, many liberals and liberal organizations (including

ACLU and People for the American Way) see cases such as Mergens as being fundamentally about the separation of church and state. They believe interrelations of religion and government are forbidden by the establishment clause of the First Amendment and are especially dangerous in public schools because of the impressionability of students. Against the argument that Mergens involved high school students and raised First Amendment issues of free expression, liberals are quick to invoke an image of adolescents as immature individuals still requiring special protection from their own misperceptions and impressionability (Commons & Rodriguez, 1990).

The conservative view is the mirror image of the liberal view and equally inconsistent. Conservatives see cases such as Hazelwood as fundamentally about school authority. Education, in their view, requires that school officials have firm control. Against the notion that education should involve academic freedom and a free market of ideas, conservatives may grant that this is fine for universities but maintain that adolescents in high school are still more like children in need of adult constraint.

Conservatives typically see Mergens, by contrast, as fundamentally a matter of religious liberty. Having eliminated prayer and traditional values from the curriculum, schools should at the very least allow voluntary religious expression by students. Concern for school authority to protect impressionable adolescents dissolves.

Although liberals and conservatives reach different conclusions, there is an important parallel. From each perspective, the two cases are perceived as raising very different issues; each case is analyzed

on the basis of ideological commitments regarding the corresponding issue. In order to support each analysis a certain image of adolescents is called up. If one is thinking in terms of freedom of expression (as liberals construe Hazelwood) or religious liberty (as conservatives construe Mergens), one is likely to invoke the rights of the individuals involved and thus emphasize their maturity. If one is thinking in terms of shielding immature minds from controversy (as conservatives view Hazelwood) or from religious inculcation (as liberals see Mergens), one tends to invoke the need to protect students from each other and thus to stress their immaturity. It is all too easy to call up visions of adolescents as mature or immature as suits one's political inclinations on the question at hand.

## Adolescents as Children and Adolescents as Adults

Given the close connection of the issues in Hazelwood and Mergens, it appears that the two cases should be approached on the basis of a consistent view of adolescents. In this section, I consider two such views. The adolescent-as-child view construes adolescents as sufficiently different from adults that general constitutional standards do not apply to them. The adolescent-as-adult view, by contrast, construes adolescents as sufficiently like adults that normal constitutional standards should apply.

As a general matter of First Amendment law, it is well accepted that government may set up forums for individual expression and that, within such forums, censorship of expression on the basis of its content is usually impermissible (Haiman, 1981, Chapter 14). Thus, for example, a public library need not make a room available for use by community groups; if it chooses to do so, however, it may not pick and choose which groups may use the room on the basis of whether the library board or city council approves the ideas they choose to discuss. Given such precedents, one would expect that a public school that decides to run a newspaper devoted primarily to student writing may not grant this educational benefit only to those students who hold views or address topics the principal deems appropriate. Similarly, one would expect that if a school permits voluntary student groups to use its facilities, it must do so on a nondiscriminatory basis.

Implicit in First Amendment public forum doctrine is the assumption that people understand they are free to choose whether to

participate, what ideas to express, and what groups to join. It is also assumed they understand that the views expressed are not necessarily those of the government. Such understanding need not be spontaneous; explanation of the nature of a forum is certainly permissible. If, however, even with explanation, people feel compelled to acquiesce to views they do not hold or they attribute to the government views it does not hold, then a forum may be a threat--rather than a spur--to freedoms of belief and expression.

In the case of public schools, of course, there is the further complication that school attendance for most students is compulsory. Under such circumstances the case is even stronger that government not only may but must restrict forum activity so as to prevent improper inculcation of, say, particular political or religious ideas.

The adolescent-as-child view holds that, despite their increasing maturity, adolescents are still sufficiently naive and impressionable that, regardless of explanation, their opinions will be molded by newspaper articles and invitations to join extracurricular groups, perhaps in part because they assume such articles and groups are endorsed by the school. If this is indeed a serious concern, schools must have the authority to maintain a politically and religiously neutral environment for their young students. They must have the authority to censor articles and ban groups that would be likely to create a coercive atmosphere for immature minds or improperly associate the school with particular political or religious views. These are sufficiently compelling

concerns to override general principles of free expression.

On this view of adolescents, then, both Hazelwood and Mergens would be viewed as fundamentally about school authority to protect students from harmful or unconstitutional influences on their captive minds. Given this construal, one should side with the school in each case. Schools not only should be permitted substantial control over student expression but may be constitutionally required to censor some expression for the protection of other students.

The adolescent-as-adult view, by contrast, assumes that adolescents are not fundamentally different from adults. Even adults, of course, may be influenced by what they see and hear. Such influence is not improper, however, in the case of an individual with sufficient reflective control over his or her own mind to decide what to believe. Even an adult may mistakenly assume governmental support for views expressed under its auspices but such mistakes are easily remedied by simple explanation of the concept of a public forum. The adolescent-as-adult view assumes adolescents are not sufficiently different from adults with respect to these matters for governmental restriction of their speech and association to be justified. From this perspective, then, both Hazelwood and Mergens are fundamentally about freedom of expression. In neither case can censorship by the school be justified under the First Amendment (see Table 1).

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Insert Table 1 about here

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Although the two views of adolescents just discussed yield very

different conclusions, each--in contrast to the "liberal" and "conservative" views discussed earlier--takes a clear view of adolescents and applies it consistently rather than invoking tacit images of adolescence in a post hoc and inconsistent fashion to justify conclusions reached on other grounds. Being consistent, however, is not enough. There remains the question of which view of adolescents is better justified by available evidence.

To my knowledge, the only existing research directly assessing students' ability to grasp the First Amendment concept of a governmental forum for individual expression and the nonendorsement of such expression by the government is a recent series of studies by Dunkle (in preparation). No difference in understanding between tenth graders and college students was detected. Even seventh graders differed significantly from college students on only one of the three dimensions assessed, and most of the seventh graders showed an impressive level of comprehension even on that dimension.

With respect to the more general issue of competence to grasp and reason with abstract principles, relevant research is abundant. Thousands of studies over the past several decades have investigated developmental changes in the understanding and use of concepts and forms of reasoning at least as abstract as what is required to grasp the nature of a public forum and reason about equal access to such a forum. Available evidence covers the ability to analyze a variety of logical propositions; to deduce proper conclusions from given information; to distinguish the logical form of an argument from the truth or falsity of its content; to recognize the necessity of

deductive inferences; to identify, seek, and interpret relevant evidence; to formulate and test hypotheses; and to reflect on the nature and validity of one's knowledge and reasoning (for reviews, see Kuhn, 1989; Kuhn, Amsel, & O'Loughlin, 1988; Moshman, 1989, Chapter 3, 1990a, b, d; O'Brien, 1987; Overton, 1990; Small, 1990, Chapters 8, 9).

Results across a wide variety of tasks and domains support the adolescent-as-adult view. Children as old as age 10 or 11 often fail to comprehend and use abstract concepts and forms of reasoning that are widespread in adults. By early adolescence, however, basic adult concepts and reasoning appear to be widely available (e.g., Moshman & Franks, 1986). Adolescents do not consistently use mature reasoning, of course, but neither do adults (Evans, 1989; Kuhn, 1989; Kuhn et al., 1988). And although some adults sometimes use concepts and forms of reasoning rare in adolescents, such levels of maturity appear limited to individuals who are either highly educated or working in areas of special expertise (Rybash, Hoyer, & Roodin, 1986).

I do not mean to deny that development continues through adolescence and beyond; the average adult is in many ways more mature than the average adolescent (Overton, 1990). But differences <u>between</u> adolescents and adults are modest compared to differences <u>among</u> adolescents or adults of any given age. Concepts and reasoning widespread in adults are invariably common in adolescents as well. There is no evidence of any important component of rationality that is lacking in adolescents and found in most adults. The subtle changes in reasoning and understanding that occur over the course of

adolescence and adulthood, even if statistically and theoretically significant, do not meet any reasonable standard of constitutional significance. Any criterion that would justify distinguishing adolescents from adults with respect to basic intellectual rights could equally justify invidious distinctions among normal adults (for a critique of this view, see Commons & Rodriguez, 1990; for a reply, see Moshman, 1990c).

Looking beyond the realm of intellectual competence, it might be argued that the complex social and personality issues involved in constructing an identity render adolescents especially vulnerable and needing of protection. But there is little evidence to support such a view. On the contrary, current theory and research suggest that, if there is ever a time when the opportunity to generate, explore, and discuss ideas freely is especially critical to one's development, adolescence is it (Waterman, 1985). Thus identity formation issues, though a serious concern, provide little reason to restrict adolescent expression, and much reason not to.

On First Amendment matters such as freedom of expression, then, there should be a rebuttable presumption of adolescent maturity. Intellectual rights may be denied to a class of people if it can be shown that most members of that class are so lacking in fundamental rationality that the rights in question have little meaning for them or that the exercise of such rights will yield specific and substantial dangers. But there should be a burden of proof on the government to show that. In the case of free expression for students in public secondary schools, under the circumstances of Hazelwood and

Mergens, evidence to rebut the presumption of rational competence is entirely lacking.

## Conclusion

I have argued that public secondary schools should respect their students' intellectual liberties and should not override such liberties in order to protect students from their own immaturity without specific evidence of relevant incompetence. Given that neither of the school systems in the cases in question provided such evidence, I believe Mergens was correctly decided and Hazelwood should also have been decided in favor of the students.

Although my focus has been on First Amendment rights in public secondary schools, inconsistent and unsupported psychological assumptions can also be identified in other areas of governmental authority over adolescents (cf. Hodgson v. Minnesota, 1990; Thompson v. Oklahoma, 1988). Liberals, for example, commonly see the question of adolescent abortion as an abortion issue. Given their propensity to favor abortion rights they call up an image of a competent adolescent furthering her own best interests by making her own decision with the advice of whomever, if anyone, she chooses to consult. Thus liberals resist any requirement that she even notify one of her parents (much less get parental consent). Application of the death penalty to adolescents, on the other hand, is seen as a death penalty issue. Given their opposition to the death penalty, liberals seeking to restrict its use call up an image of the adolescent as a mere child who surely is not sufficiently responsible for his or her own actions to bear the same consequences as an adult.

Again, the standard conservative pattern on these issues is the mirror image of the liberal pattern and equally inconsistent. Given their opposition to abortion, conservatives wish to restrict it in any way they can. On the issue of adolescent abortion, then, they think of a young girl incapable of full rational or moral choice and believe she should be required to notify one or both parents, and perhaps even get their consent, before having an abortion. But given their concern about crime and the need for strong punishment, conservatives just as readily see the adolescent criminal as sufficiently responsible for his or her actions to be punished on a par with any adult and even put to death for what he or she has done.

In light of such inconsistencies, I would suggest that in the realm of choice and action, as in the First Amendment realm of belief and expression, decisions regarding adolescents should be based on explicit and empirically justified assumptions about their maturity. Immaturity, in general, entails a need for special limits and special consideration. Maturity, correspondingly, entails freedom to choose and responsibility for one's choices. If adolescents are still children who cannot make rational choices and are not responsible for their actions, then governmental restrictions that enhance parental or other adult oversight may be appropriate whereas application of adult criminal penalties such as execution is difficult to justify. If, on the other hand, adolescents are essentially mature in their ability to direct their own actions, then they presumably should be free to make their own reproductive choices on the same basis as an adult and may be held as responsible as any adult for criminal

behavior.

Special circumstances may, of course, justify special exceptions. Criteria for maturity need not be identical for all behavioral domains or legal determinations. One might even make a case for a transitional, experimental period in which developing individuals are accorded substantial liberty but a lesser degree of responsibility. Such apparent inconsistencies are not necessarily inappropriate, but they should be explicitly recognized and justified (cf. Melton, 1989).

Abortion and capital punishment are literally matters of life and death. For public schools making decisions about the content of the school newspaper and extracurricular forums, the issues are, perhaps, not quite so urgent. Nevertheless, they can be very serious. Permitting a genuinely free press and an open forum for student groups will lead in some schools to the publication of articles deeply offensive to the community and regular meetings of what many consider to be unsavory or dangerous groups. A genuinely open marketplace of ideas may put serious intellectual, political, and religious pressures on students. The temptation to censor articles, as allowed by Hazelwood, or to eliminate all extracurricular groups, as allowed by Mergens, will be strong.

There is good reason, however, to resist. Supreme Court interpretations of the Constitution provide a floor with respect to fundamental rights, not a ceiling. Other government institutions are free to exceed that floor. As institutions dedicated to promoting students' cognitive development and their respect for constitutional

values, public schools should be especially clear and firm in their support for intellectual freedom (West Virginia v. Barnette, 1943).

Perhaps more than any other American institution, the public school serves as an official link between the generations of our society. Through its commitment to intellectual freedom and its willingness to face the resulting controversies, a public school can show students how much we value independent thought and open discussion. Alternatively, by restricting student expression, a school demonstrates that we fear intellectual autonomy and discordant views, preferring social conformity and authoritarian control. There is reason to believe that, either way, adolescents are mature enough to get the message.

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Footnote

1. Another explanation for the different outcomes in Hazelwood and Mergens is that, although both cases involved claims by high schools of substantial authority over student expression, Hazelwood weighed the school's claim against the First Amendment guarantee of freedom of expression whereas Mergens weighed the school's claim against an act of Congress. The Mergens court did not need to decide whether student religious groups are protected by the First Amendment free speech clause because it determined that such groups are protected by the Equal Access Act (1984), which requires that public high schools that permit noncurriculum-related student groups to meet must do so on a nondiscriminatory basis.

But the students argued that, even without the Equal Access Act, permitting their group equal opportunity to meet was required by the free speech clause of the First Amendment as applied to public educational institutions in Widmar v. Vincent (1981), a parallel case involving college students. Their argument was unanimously accepted by the Eighth Circuit panel (Mergens v. Board of Education, 1989). Having decided the issue in Mergens on the basis of the Equal Access Act, the Supreme Court declined to consider the First Amendment free speech claim but probably would have reached the same conclusion (cf. Bender v. Williamsport, 1986, Powell, J., dissenting).

Table 1

Four Perspectives on Two First Amendment Controversies

| | Censorship of School Newspaper | Exclusion of Student Religious Groups |
|---|---|---|
| "Liberal" view | Issue: Freedom of expression<br>Conclusion: Support students | Issue: Church/state separation<br>Conclusion: Support school |
| "Conservative" view | Issue: School authority<br>Conclusion: Support school | Issue: Freedom of religion<br>Conclusion: Support students |
| Adolescents as children | Issue: School authority<br>Conclusion: Support school | Issue: School authority<br>Conclusion: Support school |
| Adolescents as adults | Issue: Freedom of expression<br>Conclusion: Support students | Issue: Freedom of expression<br>Conclusion: Support students |